No. 17-269

In The Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON, THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, AND THE NEZ PERCE TRIBE IN SUPPORT OF RESPONDENT UNITED STATES AND RESPONDENT TRIBES AND AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether Washington violated a treaty "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens," by constructing hundreds of barrier culverts that block salmon from reaching many usual and accustomed fishing grounds and harm the salmon population by preventing salmon from migrating to reproduce.

2. Whether Washington can assert an equitable defense against the United States based on the notion that the United States made the state use these culvert designs.

3. Whether the district court's injunction is consistent with the court's equitable discretion.

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INTERESTS OF *AMICI CURIAE* COLUMBIA RIVER TREATY TRIBES[1]

The Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes of the Umatilla Indian Reservation, and the Nez Perce Tribe are each successor-in-interest to treaties with the United States that "secured" to the Tribe "the right of taking fish" at "all" their usual and accustomed fishing places, substantially identical to the treaty provisions at issue in this case. Treaty of June 25, 1855, with the Tribes of Middle Oregon (Warm Springs Treaty) (12 Stat. 963); Treaty of June 9, 1855 with the Umatilla Tribe (12 Stat. 945); and Treaty of June 11, 1855 with the Nez Perces (12 Stat. 957).[2] These three *amici* tribes, together with the respondent Confederated Tribes and Bands of the Yakama Nation, are collectively referred to as the "Columbia River Treaty

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel represent that no party to this case nor their counsel authorized this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

[2] The treaties of *amici* Umatilla Tribe and Nez Perce Tribe, along with respondent Yakama Nation's treaty, were negotiated and signed at the Walla Walla (Washington Territory) Treaty Council by Isaac Stevens, Governor and Superintendent of Indian Affairs for Washington Territory, and Joel Palmer, Superintendent of Indian Affairs for Oregon Territory. The Warm Springs Treaty was negotiated and signed by Joel Palmer at the Wasco Treaty Council near The Dalles, Oregon Territory. Collectively, the 1855 treaties of the Columbia River Treaty Tribes are referred to as the "Stevens" treaties.

Tribes." The United States initiated suit on behalf of these four Columbia River Treaty Tribes in 1968 to implement and enforce these treaty fishing rights in *United States v. Oregon* (consolidated with *Sohappy v. Smith*), 302 F. Supp. 899, 904 (D. Or. 1969). The three *amici* Columbia River Tribes appeared as *amici* and submitted a joint brief supporting the Respondent Tribes and the United States in the district court proceeding in this case. *United States v. Washington*, Civ. No. 2:01-SP-00001-RSM (W.D. Wash. Sept. 27, 2006), ECF No. 314.

SUMMARY OF ARGUMENT

The *amici* Columbia River Treaty Tribes, neighbors to the south of the Respondent Tribes, share with those Tribes a similar treaty history, and nearly identical fishing provisions in their treaties securing the right to take fish at all their usual and accustomed fishing places. This Court's earliest interpretations of the Stevens treaties fishing language, beginning with *United States v. Winans* in 1905, arose on the Columbia River involving Columbia River treaty Indians.

Proceedings on the Columbia River, beginning with *Winans*, have laid the foundation for the district court's ruling in this case by recognizing the treaty fishing right's protection of the fishery itself, not merely access or an opportunity to fish. The foundational right to the fishery has been upheld on the Columbia River by the lower courts, and it has not resulted, as Washington and its *amici* speculate will happen here, in widespread disruption. Under the auspices of *United States v. Oregon* and the Northwest Power Act, Oregon, Washington, and Idaho have acknowledged the Columbia River Tribes' treaty rights and sovereign co-management responsibilities. Together, the State and Tribal governments have worked collaboratively not simply to divide shares of whatever fish harvest may happen to be available each year, but to protect productive fish habitat, restore habitat which has been degraded, and rebuild salmon runs.

The recognition of and respect for a meaningful Treaty right has underpinned productive action that has benefited the resource, the Tribes, non-Indian fishermen, and the Columbia River region as a whole.

ARGUMENT

I. The Interdependence Of Fish And The Indians Of The Pacific Northwest Cannot Be Overstated, And Is Central To Understanding The Stevens' Treaty Fishing Rights.

Geographically, the *United States v. Washington* case area is set in the marine waters and tributaries of Puget Sound, Strait of Juan de Fuca, and the Washington coast, and the Columbia River Treaty Tribes' issues are set in a single, albeit very large, river system, the Columbia River Basin. Although geographically distinct, the Columbia River Tribes and the Respondent Tribes share many similarities: from the importance of salmon; to the assurances sought by the tribes and provided by the United States in the treaty negotiations; to the treaty language that "secured" to the tribes "the right of taking fish"; to the case law developments in the two Pacific Northwest treaty Indian fishing rights cases, *United States v. Washington* and *United States v. Oregon*.

This Court's early interpretations of these treaty fishing rights provisions emerged from the Columbia River. *United States v. Winans*, 198 U.S. 371 (1905); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); and *Tulee v. Washington*, 315 U.S. 681 (1942). In these cases, and in the *United States v. Oregon*, *United States v. Washington*, and *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) cases to follow, the courts have necessarily recognized the interdependence of the fish and the Indians of the Pacific Northwest, as well as the

importance of the fishery guarantees in the Treaties as evidenced by the record of the treaty negotiations.

The interdependence of the fish and the Indians of the Columbia Basin cannot be overstated: fish are essential to the Columbia River Treaty Tribes' sustenance, resiliency, health, culture, language, ceremonies, and very way of life. The courts have recognized this:

> From the earliest known times, up to and beyond the time of the treaties, the Indians comprising each of the intervenor tribes were primarily a fishing, hunting, and gathering people dependent almost entirely upon the natural animal and vegetative resources of the region for their subsistence and culture. They were heavily dependent upon such fish for their subsistence and trade with other tribes and later with the settlers.

United States v. Oregon, 302 F. Supp. at 906. This continues today. As this Court similarly noted in *Fishing Vessel*, the Indians of the Pacific Northwest have always "shared a vital and unifying dependence on anadromous fish." 443 U.S. at 676.

II. The Assurances Sought And Provided At The Treaty Negotiations Concerning The Treaty Fishing Provision Were Critical To Concluding The Treaties As Evidenced By The Record Of The Treaty Negotiations, And Are Central To Understanding The Stevens Treaty Fishing Rights.

Just as the importance of the fish to the Columbia River Treaty Tribes and the Respondent Tribes cannot be overstated, the importance of the fishing provision to concluding the treaties cannot be overstated.

The treaties of *amici* Umatilla and Nez Perce Tribes were negotiated in early June 1855 at the Walla Walla (Washington Territory) Treaty Council along with the treaty of respondent Yakama Nation. Washington Territorial Governor Stevens and Oregon Territorial Indian Affairs Superintendent Joel Palmer were the United States representatives. The treaty with *amicus* Warm Springs Tribe was negotiated two weeks later in late June 1855 at the Wasco Treaty Council near present day The Dalles, Oregon. Superintendent Palmer was the United States representative.

At the Walla Walla Treaty Council, Governor Stevens assured a prominent and skeptical Nez Perce leader, Looking Glass, regarding the treaty's off-reservation rights:

> I will ask of Looking Glass whether he has been told of our council. Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the

> reservation on lands not claimed by settlers, that he can catch fish at any of the fishing stations, that he can kill game and go to buffalo when he pleases, that he can get roots and berries on any of the lands not occupied by settlers.

Record of Proceedings, Walla Walla Valley Treaty Council, June 9, 1855.

The courts have consistently understood the foundational significance of the assurances made by the United States' representatives at the treaty negotiations. In *United States v. Oregon*, the court stated, in its initial decree:

> During the negotiations which led to the signing of the treaties the tribal leaders expressed great concern over their right to continue to resort to their fishing places and hunting grounds. They were reluctant to sign the treaties until given assurances [citing Governor Stevens' assurances to Looking Glass at the Walla Walla Valley Treaty Council] that they could continue to go to such places and take fish and game there. The official records of the treaty negotiations prepared by the United States representatives reflect this concern and also the assurances given to the Indians on the point as inducement for their acceptance of the treaties.

United States v. Oregon, 302 F. Supp. at 906 and n.1. *See Fishing Vessel*, 443 U.S. at 667 n.1 (Stevens assuring assembled Indians at Point-No Point treaty grounds that "This paper secures your fish").

Similarly, the district court in this case emphasized this Court's statement in *Fishing Vessel*:

> Governor Stevens and his associates were well aware of the 'sense' in which the Indians were likely to view assurances regarding their fishing rights. During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and *the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent.*

443 U.S. at 676; District Court's Order on Cross-Motions for Summary Judgment, Pet. App. 264a (adding emphasis).

III. The Stevens Treaties "Secure" To The Tribes "The Right Of Taking Fish" At "All" Usual And Accustomed Grounds And Stations.

The text of the Stevens Treaties "secured" to the tribes "the right of taking fish" at "all" usual and accustomed grounds and stations. First, the word "secure" as used in the Treaties, and used by Stevens in the treaty negotiations, is defined by contemporaneous Webster's dictionaries as:

> To guard effectively from danger; to make safe. . . . To make certain; to put beyond hazard. . . . To insure, as property. (1828).[3]
>
> To make safe; to relieve from apprehensions of, or exposure to, danger; to guard; to protect. . . . To put beyond hazard of not receiving, or of losing; to make certain; to assure; to insure. (1840, 1847, and 1856).[4]

Second, the right secured is the right to "tak[e] fish," that is to "get [them] into [their] power." 2 Websters Dictionary 88h (giving the example "to take fishes with nets, or with hook and line"). Third, the secured right to take fish extends to "all" of the tribes "usual and accustomed grounds and stations." Thus, the text of the treaties preserves the tribes' ability to actually harvest fish, not merely to dip their nets into an empty river.

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[3] 2 Noah Webster, An American Dictionary of the English Language 66e (1828).

[4] Noah Webster, L.L.D., An American Dictionary of the English Language (1840). (The 1840, 1847, and 1856 editions of Webster's Dictionary, approved by Acts of Congress, all define "secure" the same way.)

IV. This Court's First Case Interpreting A Stevens Treaty Fishing Right, *United States v. Winans*, Laid The Foundation For The District Court's Ruling In This Case By Recognizing The Treaty Fishing Right's Protection Of The Fishery Itself, Not Merely Access Or An Opportunity To Fish.

Over one hundred years ago, this Court held that the Stevens treaty fishing right provides significant, and enforceable, protection for the secured right to take fish. In *United States v. Winans*, the United States, on behalf of Yakama Indians, sued the owners of state-licensed fish wheels in the Columbia River for violating a Stevens Treaty, because the fish wheels "catch salmon by the ton" and were "rapidly diminishing the supply" of salmon as well as excluding the Yakama tribal members from their fishing places. 198 U.S. at 372. The United States Solicitor General cautioned that in interpreting the Stevens Treaty fishing clause, the focus must be on the assurances sought by and made to the tribes in negotiating the treaty and the fishing rights secured therein, rather than redefining the treaty rights to harmonize them with subsequent actions of non-Indians.[5] The Court held that the

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[5] In *U.S. v. Winans*, 198 U.S. at 372, the Solicitor General argued:

> The Government has always striven against disparity between our promises when obtaining treaties and the actual meaning of the instrument as it is sought to be construed when the greed of white settlers is aroused. The treaty involved was not merely one of peace and amity, or of "friendship, limits and accommodation," but a treaty of cession of lands by accurate description and

Treaty "imposed a servitude" and prohibited non-Indians from using devices such as fish wheels to obtain "exclusive possession of fishing places." 198 U.S. at 381-82. The Court remanded for a remedy in accordance with the Solicitor General's suggestion that the fish wheels be removed or their operation heavily curtailed, allowing fish to escape upstream for tribal fishing. *Id.* at 384.

Washington attempts to read *Winans* narrowly as standing only for the proposition that the tribes have a right of "access to traditional fishing places." Wash. Br. at 30. This cramped reading of *Winans* cannot be squared with the case itself, as this Court recognized that the fish wheels infringed on the Stevens treaty rights both by blocking tribal members from fishing and by preventing fish from passing upstream to the tribal usual and accustomed fishing grounds. 198 U.S. at 384.

In *Winans*, this Court applied two foundational principles of Indian treaty law first established in the 1832 landmark case of *Worcester v. Georgia*, 31 U.S. 515 (1832): the "reserved rights" doctrine, and the special rules for interpreting Indian treaty language. Thus, this Court in *Winans* explained that the 1855 Yakama Treaty's secured right to take fish "was a part of larger rights possessed by the Indians" which "were not much less necessary to the existence of the Indians than the atmosphere they breathed." 198 U.S. at 381. Properly

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on considerations duly expressed, one of which was the fishery rights now contended for.

understood "the treaty was not a grant of rights to the Indians, but a grant of right from them – a reservation of those not granted." *Id.* The treaty contains no express right of access across privately owned "perfect, absolute title" land to off-reservation usual and accustomed fishing places, because "[r]eservations were not of particular parcels of land, and could not be expressed in deeds." *Id.* The treaty language, "reserved rights, however, to every individual Indian, as though named therein" and "imposed a servitude upon every piece of land as though described therein." *Id.*[6] The treaty language, this Court explained, must be construed as the treaty Indians, "that unlettered people," had understood it. *Id.* at 380.

This Court in *Winans* was faithful to the treaty interpretation principles first set out by Chief Justice Marshall in *Worcester*. In *Worcester*, this Court was required to interpret certain provisions of the 1785 Treaty of Hopewell between the United States and the Cherokee Nation. In doing so, this Court developed and applied special Indian treaty canons of construction so that "unlettered" Indian treaty signers would have treaty terms interpreted by the Court as they would have understood them: "There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that every one

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[6] The Court rejected the argument that there were no rights because the deed contained no mention of a treaty access right: "It makes no difference, therefore, that the patents issued by the Department are absolute in form. They are subject to the treaty as to the other laws of the land." *Id.* at 382.

makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them." 31 U.S. at 551. Thus, the 1785 Hopewell Treaty's Article IV use of term "allotted" did not mean the Cherokees were "receiving" their reservation lands from the United States, but, instead, that they were reserving them from the aboriginal title lands they had "ceded" and "granted" to the United States. Moreover, the Article IV term "hunting grounds" did not restrict the Cherokees' "full use of the lands they reserved," but only described their primary lifestyle at treaty time and accommodated changes in use as the tribe developed. *Id.* at 553. Finally, the Article IX Treaty language authorizing Congress to "manage all their affairs" could not be construed as "a surrender of [Cherokee] self government" but, instead, as the Cherokees would have understood this language, to mean "the regulation of all affairs connected with their trade." *Id.* at 518. Any other interpretation " . . . would convert a treaty of peace covertly into an act, annihilating the political existence of one of the parties." 31 U.S. at 554.

Following *Winans*, the next two occasions this Court had to consider the Stevens treaties, the cases again arose on the Columbia River and involved Yakama tribal fishermen. In *Seufert Bros. Co.*, 249 U.S. 194, this Court applied the by then well-settled rule that "we will construe a treaty with the Indians as 'that unlettered people' understood it" to conclude that a treaty tribe's "usual and accustomed fishing places" were not limited by the boundaries of the tribe's treaty ceded territory. *Id.* at 198. In *Tulee*, 315 U.S. at 684, this

Court, in interpreting the Yakama treaty, emphasized the significance of the negotiations that led to the Stevens treaties: "From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes." This Court again stated that: "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." *Id.* at 684-85. Thus, this Court held that the 1855 Yakama Treaty precluded application of state license fees to treaty fishermen.

V. The *United States v. Oregon* Treaty Fishing Rights Litigation.

Throughout the middle of the twentieth century, disputes between Columbia River Treaty Tribes and state regulators continued to arise, eventually leading in 1968 to a federal court action brought by more than a dozen individual fishermen, denominated *Sohappy v. Smith*, shortly followed by an action filed by the United States as trustee for the Columbia River Treaty Tribes. The two cases were consolidated as *United States v. Oregon*, Civ. Nos. 68-409, 68-513 (D. Or.) and proceeded to trial and judgment before Judge Belloni. In a 1969 order and opinion, the district court laid out the limited

circumstances under which the state could regulate treaty Indian fishing, which came to be called the "conservation necessity principles," and established that the tribes have "an absolute right to [the] fishery, [and] are entitled to a 'fair share' of the fish produced by the Columbia River system." *United States v. Oregon*, 302 F. Supp. at 911.

In 1974, Washington intervened in *United States v. Oregon* and, in so doing, became bound by the law of the case. Also in 1974, the district court amended its 1969 judgment to define the treaty tribes' "fair share" allocation as "50 percent" of the spring Chinook salmon run to the Columbia. *Sohappy v. Smith*, 529 F.2d 570, 571-73 (9th Cir. 1976) (per curiam).

In 1977, at the urging of the Oregon district court, the parties entered into a "five-year plan" for management and allocation of Columbia River anadromous fish resources subject to the Columbia River Treaty Tribes' fishing rights. *United States v. Oregon*, 657 F.2d 1009, 1011 (9th Cir. 1981). Concerns about the plan's failure to adequately account for non-Indian ocean fisheries led to tribal discontent and renewed pressure from both the district court and the Ninth Circuit to negotiate a replacement plan. *United States v. Oregon*, 718 F.2d 299, 302 n.2 (9th Cir 1983); *United States v. Oregon*, 769 F.2d 1410, 1412-14 (9th Cir. 1985). In 1984, Idaho was allowed to intervene on appeal to the Ninth Circuit. *United States v. Oregon*, 745 F.2d 550 (9th Cir. 1984). Following expiration of the five-year plan, and while the parties continued to work on a comprehensive management plan, the parties negotiated a series

of one-year management plans in 1985, 1986 and 1987. The 1987 plan was acceptable to most but not to all the parties.[7] The district court approved the 1987 plan over Idaho's objections. *United States v. Oregon*, 666 F. Supp. 1461 (D. Or. 1987).

In 1988, the *United States v. Oregon* parties (again, except for Idaho and the Shoshone-Bannock Tribes) reached agreement on a long-term, ten-year management plan, called the Columbia River Fish Management Plan. The Management Plan was approved by the district court over the objections of those two parties, and several non-parties, and was upheld on appeal. *United States v. Oregon*, 913 F.2d 576 (9th Cir. 1990).

As the *United States v. Oregon* parties were implementing the Management Plan, some salmon and steelhead species returning to the Columbia and Snake River Basins were listed under the Endangered Species Act (ESA), beginning with the listing of Snake River sockeye salmon in 1991. 56 Fed. Reg. 58,619 (Nov. 20, 1991). The Columbia River Treaty Tribes worked to ensure that implementation of the ESA was harmonized with their treaty-reserved fishing rights,

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[7] The Shoshone-Bannock Tribes filed a motion to intervene in *United States v. Oregon*. The court granted their motion to intervene, and as a result, they are a party to the case. The Shoshone-Bannock Tribes have never taken action on their complaint in intervention, and all parties have reserved the right to assert any and all defenses they may have to any claims of the Shoshone-Bannock Tribes. *U.S. v. Oregon* Management Agreement (2018-2027), Civ. No. 3:68-cv-00513-MO (D. Or., Feb. 26, 2018), ECF 2607-1.

consistent with the "conservation necessity principles" set forth in the treaty fishing rights case law. The United States' distinct treaty and trust responsibilities to Indian tribes, consistent with the "conservation necessity principles," was acknowledged by the federal agencies responsible for administering the ESA. *Joint Secretarial Order 3206 on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* (issued by the Departments of Interior and Commerce) (June 5, 1997).

From 1998 to 2008, the *United States v. Oregon* parties entered into a series of interim management agreements before entering into the 2008-2017 Columbia River Fish Management Agreement approved by the court. *United States v. Oregon*, Civ. No. 3:68-cv-00513 (D. Or., Aug. 11, 12, 2008), ECF 2546, 2547. Recently, following three years of negotiations, the *United States v. Oregon* parties entered into another Management Agreement for 2018-2027. *Id.*, (D. Or., Feb. 26, 2018), ECF 2607-1.

VI. Proceedings In The Columbia River Basin Refute Washington's Arguments That The District Court's Orders In This Case Are Unprecedented Or Novel, And That Recognition Of And Respect For Treaty Rights And Treaty-Based Salmon Protection Will Produce A Flood Of Litigation And Constrain All Development.

In 1980, in *United States v. Oregon*, the district court, consistent with the reciprocal treaty obligations

to prevent destruction of the fish runs, exercised its equity jurisdiction to protect the spring Chinook run as it migrated in the Yakima River, and the Court of Appeals affirmed, in an opinion by then-Judge Kennedy. *United States v. Oregon*, 657 F.2d 1009, 1033 (9th Cir. 1981) (affirming the closure of the Yakama Nation's fishery at various locations in the Yakima Basin for six days per week). These spring Chinook salmon then became the subject matter of a separate proceeding, described as "the collision of two interests: the Yakima[8] Nation's interest in preservation of their fishing rights, and the eastern Washington farmers' interest in preservation of water needed for crops in the dry spring and summer." *Kittitas Reclamation District v. Sunnyside Valley Irrig. Dist.*, 763 F.2d 1032 (9th Cir. 1985), *cert. denied sub nom. Sunnyside Valley Irrig. Dist. v. United States*, 474 U.S. 1032 (1985). The record before the lower court in *Kittitas* amply described how the Yakama fishery has been closed in May to protect the same spring Chinook salmon that had subsequently spawned below the Cle Elum Dam[9] in September. Five months after the fishery had been enjoined to protect the resource, the district court ordered water to be released from the Cle Elum Dam to protect sixty spring chinook salmon redds (spawning beds) from

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[8] In 1994, the Yakama Nation restored the more historically accurate "Yakama" spelling.

[9] The Cle Elum Dam is located in the upper reaches of the Yakima River Basin and is operated by the Bureau of Reclamation. The Yakima River and its many tributaries, including the Cle Elum River, together comprise one of the major salmon-producing basins tributary to the Columbia River.

destruction, and the Court of Appeals affirmed. *Id.* Specifically, the *Kittitas* court held that the district court " . . . was empowered to issue orders directing the allocation of water within the Yakima River system. Its orders authorizing the watermaster to preserve the 1980 redds were reasonable emergency measures." *Id.* at 1035.[10] Thus, the *Kittitas* court, mindful of this

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[10] The concerns raised by Washington's *amici* Modoc Point Irrigation District (MPID) et al. miss the mark. The Treaty of October 14, 1864 between the United States and the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians, 16 Stat. 707 (1864 Treaty) of concern to *amici*, secured to the Klamath Tribes the exclusive right to hunt and fish within the reservation boundary and includes implied water rights under the *Winans* and *Winters* doctrines. *Winans*, 198 U.S. 371 (1905); *Winters v. United States*, 207 U.S. 564 (1908). *See Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979) (*Kimball II*); *See also United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) (*Adair II*). In fact, *Adair II* held that the Tribes' *irrigation* rights, from which *amici* MPID's rights derive, are subordinate to the Tribes' water rights to support its hunting and fishing lifestyle, which carries "an earlier priority date for appropriation [time immemorial], because of historical use, than do water rights for irrigation." *Adair II*, at 1416 n.25. *Amici* MPID hold irrigation water rights that are junior to the Klamath Tribes' senior time immemorial instream water rights needed to support its hunting and fishing rights. *Adair II*, at 1414. Quantification of the Klamath Tribes' instream water rights is underway in the Klamath Basin Adjudication, *In re Waters of the Klamath River Basin*, No. WA1300001 (Or. Klamath Cir. Ct. Mar. 7, 2013), an action in which *amici* MPID are parties. In times of shortage all junior water right holders' use, like *amici* MPID's, are subject to curtailment in favor of the senior water right holder's use under the long-standing western water law doctrine of prior appropriation or first-in-time, first-in-right. *Amici* MPID's arguments are nothing more than a desperate attempt to re-litigate *Adair II*. Upon close examination of *amici* MPID's circumstances, their real complaint is with the prior appropriation doctrine itself.

"collision of interests," enjoined the release of water to protect salmon spawning beds and the treaty fishing rights of the Yakama Nation in the fishery itself.

In *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977), the district court found that construction of a proposed dam on Catherine Creek, a tributary of the Grande Ronde River in northeastern Oregon and a part of the Columbia River Basin, would nullify treaty fishing rights by inundating the Umatilla Tribes' usual and accustomed fishing stations and entirely eliminating the steelhead run at all of the Tribes' fishing stations upstream of the dam. To prevent this treaty violation, the district court permanently enjoined the Army Corps of Engineers from constructing a dam and reservoir, despite the Corps' promises to mitigate the project's other environmental impacts, including a proposed program to trap and haul spring adult Chinook around the dam. *Id.* at 555.

Washington's argument that the Stevens treaty negotiators failed to provide for a fully purposeful reservation of the treaty fishing right or that the lower courts' orders in this case are unprecedented or novel cannot be squared with these proceedings from the Columbia River Basin. These proceedings dealt with fact-specific infringements on the treaty right that were presented to the court, much as this case addresses solely the specific facts concerning Washington's barrier culverts.

Amici arguments offered in support of Washington that propose introducing a rule that relief should only be available under the treaties where actions are "intended" to reduce salmon abundance (*Amicus* Pacific Legal Foundation Brief at 5) or that would preclude relief unless there is evidence suggesting that "discrimination against tribal fishing rights tainted the design and operation of Washington's culvert system" (*Amici* Idaho et al. Brief at 16), also cannot be squared with these cases from the Columbia Basin. Nor is there any other basis for introducing a *mens rea* type of inquiry about whether an activity is "intended" to impact fish (as opposed to objectively impacting fish), or for precluding relief unless the activity specifically discriminates against tribes.[11]

Finally, these proceedings from the Columbia Basin illustrate that recognition of and respect for treaty

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[11] *Amici* Idaho et al. attempt to find support for a "non-discriminatory standard" (Idaho et al. *amici* Brief at 15-16) in a characterization set forth in a district court opinion in *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791 (D. Idaho 1994). That case's characterization of the treaty fishing right has been widely criticized by legal scholars and commentators. *See, e.g.*, Allen H. Sanders, *Damaging Indian Treaty Fisheries: A Violation of Tribal Property Rights*, 7 Pub. Land & Resources L. Rev. 153 (1996). And notably, after the Nez Perce Tribe appealed the decision to the Ninth Circuit and the case was fully briefed and awaiting oral argument, the Tribe and Idaho Power Company reached a settlement agreement whereby Idaho Power Company agreed to pay the Tribe $11.5 million in exchange for the Tribe dismissing the legal action. The district court ordered that the settlement agreement is "incorporated into the Judgment and made a part of the Judgment." *Nez Perce Tribe v. Idaho Power Co.*, Civ. No. 91-517, Judgment, Dkt. 96 (Mar. 21, 1997).

rights and treaty-based salmon protection has not produced a flood of litigation or constrained all development. With treaty rights and treaty-based salmon protection as the legal foundation, and with resort to litigation available when necessary to address fact-specific infringements to the treaty right, Oregon, Washington, Idaho, and Montana have productively worked with the Columbia River Treaty Tribes to benefit salmon, the Tribes, non-Indian fishermen, and the Columbia Basin region as a whole.[12]

VII. The Treaty-Reserved Fishing Right Is Integral To Collaborative Management Of The Fisheries Resource And The Habitat Upon Which It Depends In The Columbia River Basin.

The Columbia River Treaty Tribes understand their treaties to ensure that a state may no more significantly diminish the number of fish available for harvest through the fish-blocking culverts at issue here, than it may through devices such as state-licensed "fish wheels" (*Winans*), property law concepts that fail to acknowledge the supremacy of the treaty under the United States Constitution (*Winans*, *Seufert*), state license fees (*Tulee*), or general regulations (*Passenger Fishing Vessel*). This fundamental understanding of the treaties is grounded in the significance of the fish since time immemorial to the

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[12] Notably, Oregon did not join the multi-state *amici* brief in support of Washington.

Columbia River Treaty Tribes, the assurances provided by the United States at the treaty grounds and in the treaties, and is confirmed by the foregoing cases that address the history, substance, and character of the treaty fishing clause.

Significantly, the Columbia River Treaty Tribes' foundational understanding of the treaty fishing right is also reflected in the tangible history of acceptance by Oregon, Washington, and Idaho, of the Columbia River Treaty Tribes as co-managers of the fisheries resource in a full and active capacity.

In the Columbia River Basin, as foregoing cases illustrate, litigation has been necessary when a specific fact situation has arisen and there has been resistance to acting to protect the fisheries resource from significant degradation. In the Columbia River Treaty Tribes' experience, when a party resists the meaningful requirements of the treaty fishing right, legal proceedings are necessary to confirm the treaty right. Following such rulings, the Columbia River Treaty Tribes have found that the remedy phase provides parties an opportunity to address mutual interests. When a party refuses to take advantage of that opportunity or is reluctant to do so, courts, sitting in equity, must address injunctive relief.

The Columbia River Treaty Tribes and Oregon, Washington, and Idaho have spent more time over the last forty years as co-managers collaboratively managing the fisheries resource than as adversaries litigating their respective rights and responsibilities. The

Columbia River Treaty Tribes' role as fisheries co-managers, engaging pursuant to sovereign powers as stewards on a par with the states, has been part of the complex legal and social fabric of the Columbia River Basin for decades. Oregon, Washington, and Idaho have accepted the Columbia River Treaty Tribes' role as full co-managers of the fisheries resource. In this co-management relationship, the Columbia River Treaty Tribes have been working in concert with Oregon, Washington, and Idaho not simply to divide shares of fish harvest available each year, but to exercise their sovereign authorities and scientific expertise to protect productive fish habitat, take actions to restore that which has been degraded, and to build and operate salmon hatcheries to augment natural salmon production to provide a greater abundance of fish for Indian and non-Indian harvests, while rebuilding depleted salmon runs throughout the Columbia Basin.

These co-management efforts described below, do not supplant or foreclose the necessity of fact-specific judicial determinations where, as here, particular actions in a particular context pose a significant threat to the salmon population and the fishery. Such efforts do serve to illustrate that in the Columbia Basin, Oregon, Washington, Idaho, and Montana are all familiar with these collaborative efforts where treaty rights and treaty-based salmon protection are the underpinning.

A. *United States v. Oregon* Co-Management Agreements And Mutual Commitments By States And Tribes To Exercise Their Sovereign Powers To Protect, Rebuild, And Enhance Upper Columbia River Fish Runs.

In *United States v. Oregon*, each of the long-term management plans entered into by the parties and approved by the court since 1988 has expressly included an acknowledgment by the state and federal parties that the Columbia River Treaty Tribes' "sovereign powers" encompass more than a mere claim to a fair share of whatever fish run might be available. These "sovereign powers" of the tribes and states include rights to pursue restoration of depleted fish runs, and to use "habitat protection authorities" as one means of increasing fish abundance for shared harvest. As set forth at the outset of the 1988 *United States v. Oregon* Columbia River Fish Management Plan:

> The purpose of this management plan is to provide a framework within which the Parties may exercise their sovereign powers in a coordinated and systematic manner in order to protect, rebuild, and enhance upper Columbia River fish runs while providing harvests for both treaty Indian and non-Indian fisheries. The primary goals of the Parties are to rebuild weak runs to full productivity and fairly share the harvest of upper river runs between treaty Indian and non-Indian fisheries in the ocean and Columbia River Basin. As a means to accomplish this purpose, the Parties intend

> to use (as herein specified) habitat protection authorities, enhancement efforts, and artificial production techniques as well as harvest management to ensure that Columbia River fish runs continue to provide a broad range of benefits in perpetuity. By this Agreement, the Parties have established procedures to facilitate communication and to resolve disputes fairly. It is the intent of the Parties that these procedures will permit the Parties to resolve disputes outside of court and that litigation will be used only after good faith efforts to settle disagreements through negotiation are unsuccessful.

United States v. Oregon, Civ. No. 3:68-cv-00513 (D. Or., Mar. 11, 1988), Dkt. 1490.

In 2008, twenty years after agreeing to exercise their respective sovereign powers broadly to rebuild the fish runs of the Columbia Basin in the Management Plan, the *United States v. Oregon* parties renewed these same mutual commitments nearly verbatim[13] in the next long-term Management Agreement approved by the court. *Id.*, (D. Or. Aug. 11, 12, 2008), ECF 2546, 2547.

In 2018, the *United States v. Oregon* parties once again affirmed their co-management relationship,

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[13] The only changes made in the 2008-2017 Management Agreement to the previously-quoted language, were to refer to the "Management Agreement" (rather than the Management Plan) and to the fisheries as "treaty Indian and non-treaty fisheries."

verbatim,[14] and expressly acknowledged that each has sovereign powers to protect and enhance fish habitat, build and operate fish hatcheries, and undertake other enhancement activities in the 2018-2027 *United States v. Oregon* Management Agreement. *Id.*, (D. Or. Feb. 26, 2018), ECF 2607-1. Thus, these mutual commitments between the states and Columbia River Treaty Tribes in *United States v. Oregon* to exercise their sovereign powers to protect salmon habitat and rebuild salmon abundance will be extending through a fortieth year. These acknowledgments of sovereign authorities are most certainly in service of increasing harvest abundance. More importantly, and undeniably, these sovereign authorities, including the authority to restore degraded fish habitats, protect viable fish habitat, and to build and operate fish hatcheries, are different in kind from a mere right of the Tribes to share happenstance in the fortune (or famine) of whatever nature might provide in any given year, as now argued by Washington.

B. The Northwest Power Act's Acknowledgment Of Treaty Rights And Fishery Co-Management Responsibilities In Implementing Salmon Protection, Mitigation, And Enhancement Actions.

The Columbia River Treaty Tribes also work actively with Oregon, Washington, Idaho, and Montana

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[14] The 2018-2027 Management Agreement did not alter the language of the 2008-2017 Management Agreement; stylistically, it made each sentence a paragraph.

through the Northwest Power and Conservation Council (Council). The Council was established under the Northwest Power Act, enacted by Congress in 1980. The Northwest Power Act directs the Council to develop a program to "protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries . . . affected by the development, operation, and management of [hydroelectric projects] while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply." 16 U.S.C. § 839b.

The Northwest Power Act requires the Council to adopt a fish and wildlife program that gives a "high degree of deference" to recommendations by the region's fishery managers for the content of that program. *See N.W. Resource Info. Ctr. v. N.W. Power Planning Council*, 35 F.3d 1371 (9th Cir. 1994) (*NRIC*). Notably, Congress put the fishery management authorities and expertise of the Columbia River Treaty Tribes on a par with that of Oregon, Washington, Idaho, and Montana. *Id.* The Council, and the courts, interpret the roles, expertise, and authorities of state fish and wildlife agencies and the Columbia River Treaty Tribes as equal for purposes of implementing the Northwest Power Act. *Id.* The Northwest Power Act includes substantive standards that the four-state Council must adhere to as it crafts the fish and wildlife program. *Id.* at 1389-93. One such standard relates to the treaty rights of the Columbia Basin Treaty Tribes, as the Northwest Power Act requires that any fish and wildlife program adopted by the Council "be consistent

with the legal rights of appropriate Indian tribes in the region." 16 U.S.C. § 839b(h)(6)(D).

In 1992, the Council adopted a fish and wildlife program pursuant to the Northwest Power Act entitled *A Strategy for Salmon*, 56 Fed. Reg. 56,935, 56,936 (1992). The Yakama Nation challenged the *Strategy for Salmon*, argued in *NRIC* that the Council had failed to adopt its recommendations for Columbia River water management at and through the federal dams on the Columbia River system. The Yakama Nation had joined with other state and tribe fishery managers in recommending water management at the federal dams that would better protect salmon in the Columbia Basin, and in particular, fall Chinook salmon that originate from the Snake River. The *NRIC* court exhaustively reviewed the history of the Northwest Power Act, and then examined whether the Council had complied with its substantive standards, including the requirement that the state compact agency adopt programs that are consistent with the legal rights of Indian tribes. The court stated:

> The fourth criterion [in the Northwest Power Act] requires that measures "be consistent with the legal rights of appropriate Indian tribes in the region." 16 U.S.C. § 839b(h)(6)(D). Congress recognized the preexisting rights that tribes reserved for themselves, in contrast to rights granted to them by the Government. In this light, it is reasonable to conclude that measures that would allow the extinction of Snake River fall chinook, for instance, upon which the Yakima people largely depend for

> their livelihood, may very well be inconsistent with the Yakima Nation's treaty reserved fishing rights. *See Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 674-82, 99 S.Ct. at 3068-72. We note this possibility only to sensitize the parties to this Court's duty to honor the purposes of the Act while, at the same time, strictly construing its language.

NRIC, 35 F.3d at 1392.

NRIC stands for the proposition that Congress understands the Columbia River Treaty Tribes to possess legally protectable rights to a viable fisheries resource, coupled with a "responsibility" to manage that resource as co-equal partners with state fish and wildlife agencies:

> Congress recognized, in particular, that fish and wildlife issues were, and should be, outside the expertise of the Council and the hydropower regulating agencies. Nonetheless, the need for experience and expertise with respect to fish and wildlife was plain. Looking to those having responsibility for managing such resources, Congress found the experience and expertise on which the Council should rely to frame a fish and wildlife program. Accordingly, Congress required in §839b that fishery managers be given a high degree of deference in the development of a fish and wildlife program for the Basin.
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> * * *

> We find it inherently reasonable to give agencies and tribes, those charged with the responsibility for managing our fish and wildlife, a high degree of deference in the creation of a program and the interpretation of the Act's fish and wildlife provisions.

Id. at 1388-89.

The Council has updated and amended its fish and wildlife program several times since the 1992 *Strategy for Salmon* at issue in *NRIC*. The Columbia Basin Fish and Wildlife Program currently in force includes statements demonstrating the parity between state and tribal sovereigns and the relationship of the Act and the Program to the rights of the Columbia Basin Treaty Tribes:

> **Role of fish and wildlife agencies and tribes.** The Act envisions a strong role for the state and federal fish and wildlife agencies and the basin's Indian tribes in developing the provisions of this program. The Council's program is to include measures, mostly recommended by the fish and wildlife agencies and tribes, that the Council determines "complement the existing and future activities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes" and that will "be consistent with the legal rights of appropriate Indian tribes in the region."
>
> **Rights of Indian tribes.** The Council recognizes that Indian tribes in the Columbia River Basin are sovereigns with governmental

> rights over their lands and people and with rights over natural resources that are reserved and protected in treaties, executive orders, and federal statutes. The United States has a trust obligation toward Indian tribes to preserve and protect these rights and authorities. Nothing in this program is intended to affect or modify any treaty or other right of an Indian tribe. The Act and the fish and wildlife program are intended instead as an effort in part to assist the Indian tribes in realizing their treaty and other rights and responsibilities with regard to fish and wildlife. Thus the Council also recognizes that implementation of this program will require significant interaction and cooperation with the tribes. The Council commits to work with the tribes in a relationship that recognizes the tribes' interests in co-management of affected fish and wildlife resources and respects the sovereignty of tribal governments.

Northwest Power and Conservation Council, *2014 Columbia River Basin Fish and Wildlife Program* at 16, https://www.nwcouncil.org/media/7148624/2014-12.pdf (adopted in 2015, 80 Fed. Reg. 16,463 (Mar. 27, 2015)).

In concert with their *United States v. Oregon* co-management agreements, the Columbia River Treaty Tribes have focused on collaboration with Oregon, Washington, Idaho, and Montana (and their constituent counties and local governments) to protect and restore fishery habitats across the Columbia River Basin. The fish and wildlife program adopted by the Council has provided a vehicle through which the

Columbia River Treaty Tribes have shared their expertise and the funding resources that they are positioned to access under the Northwest Power Act. For example, in the Salmon River subbasin, where the Nez Perce Tribe has Treaty-reserved fisheries, the Nez Perce Tribe joined with state and federal agencies, counties, agricultural interests, and other stakeholders to craft a scientifically sound plan to protect and restore fish habitat in the Salmon River (tributary to the Columbia River) while acknowledging the unique economic and cultural integrity of the communities and people directly involved. This "Salmon River Subbasin Plan" is a formal part of the Council's fish and wildlife program, and its Executive Summary describes the collaborative effort:

> The Planning Team was composed of representatives from government agencies with jurisdictional authority in the subbasin, tribes, fish and wildlife managers, county and industry representatives, and private landowners. The Planning Team guided the public involvement process, develop[ed] the vision statement, reviewed the biological objectives, and participate[d] in prioritizing subbasin strategies. Regular communication among and input by team members occurred throughout the planning process.

https://www.nwcouncil.org/media/119926/Salmon_Subbasin_Management_Plan.pdf.

The Salmon River Planning team members included not only expert fisheries managers with

jurisdiction over fisheries management, such as the Nez Perce Tribe, the Idaho Department of Fish and Game, and United States Fish and Wildlife Service, but also local governments and private citizens including Custer County, Adams County, Lemhi County, Idaho Association of Soil and Water Conservation Districts, Idaho Cattle Association, Idaho Women in Timber, and twelve individuals identified as ranchers or landowners in the counties covered by the plan. *Id.* The Salmon River Subbasin Plan includes the following statements that describe the shared vision and the principles upon which they founded the restoration plan for the Salmon River:

> The Planning Teams developed the vision and guiding principles for the *Salmon Subbasin Management Plan* during the fall of 2004. The vision presents the Planning Teams' desirable future for the subbasin. The guiding principles supplement, clarify and contextualize the vision. These principles are not listed in order of their ranking; they are meant to be understood as important and interconnected.
>
> 2.1 Vision Statement: The vision for the Salmon Subbasin is a productive and sustainable ecosystem that is resilient to natural and human disturbance, with diverse, native aquatic and terrestrial species, which will support long-term sustainable resource-based activities and harvest goals, while managing the impacts and needs of a growing human population.

> 2.2 Guiding Principles • Respect, recognize, and honor all legal rights, legal authorities, jurisdictions and reserved treaty rights, including private property rights, while recognizing local culture and custom. • Protect, enhance, and restore habitats to sustain and recover native aquatic and terrestrial species diversity and abundance with emphasis on the recovery and delisting of Endangered Species Act listed species. • Foster ecosystem stewardship of natural resources, recognizing all components of the ecosystem, including the human component. • Provide opportunities for local natural resource-based economies to coexist and participate in recovery of aquatic and terrestrial species. • Promote and enhance local participation in, and contribution to, information and education, natural resource problem solving, and subbasin[-] wide conservation efforts to promote understanding and appreciation of healthy and properly functioning ecosystems. • Identify and prioritize opportunities to utilize resources to implement the Salmon Subbasin Plan, Pacific Northwest Electric Power Planning and Conservation Act, and local, state, federal, and tribal programs. • Develop a scientific foundation to diagnose ecosystem problems, design, prioritize, monitor, and evaluate management to better achieve Plan objectives. • Enhance species populations to healthy levels that support tribal treaty and public harvest goals.

Id.

A similar, collaborative process has been employed by the Columbia River Treaty Tribes and incorporated in the Council's subbasin plans across Oregon, Washington, and Idaho, engaging states, counties, and local agricultural industry throughout the Columbia River Basin. The Council has adopted 59 subbasin plans (all for tributary rivers within the Columbia Basin) in its fish and wildlife program. The Columbia River Treaty Tribes have played a key role in organizing state and local interests to develop collaborative salmon habitat restoration plans, and they have diligently pursued funding for the cooperative implementation of these plans.

The Columbia River Treaty Tribes support the United States and the Respondent Tribes before this Court, as they did in the district court proceeding, most importantly because the legal basis of the district court's orders is well established in the extensive jurisprudence interpreting the Stevens treaties' fishing clause. The district court ruling addressed the specific facts before it concerning Washington's barrier culverts and did not create a "new" right; rather, the right to protect the treaty-secured fishery itself, and the corresponding duty imposed on Washington, has always been part of the Stevens treaties.

The Stevens treaty fishing right, and its treaty-based salmon protections, are integral to efforts to collaboratively manage the fisheries resource and the habitat upon which it depends. Such collaborative efforts do not supplant or foreclose the necessity of fact-specific judicial determinations where, as here, particular actions in a particular context pose a significant threat to a treaty-reserved fishery. Such efforts do serve to illustrate that the recognition of and respect for a meaningful Treaty right has underpinned productive action that has benefited the resource, the Tribes, non-Indian fishermen, and the Columbia River region as a whole.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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